

**REMARKS**

Claims 14 and 18 are currently pending in this application. Through this amendment, new claims 21 and 22 have been added. Claims 21 and 22 track the language of claims 14 and 18, but limit the flavoring composition to citrus and berry flavors. Support for this amendment may be found, for example, at Page 4 of the application as filed. In support of this Amendment and Response, the Applicant is submitting a Declaration of Maura Titone under 37 C.F.R. §1.132.

The Applicant respectfully requests reconsideration of the application in view of the concurrently-submitted Declaration and the following remarks.

In the Office Action, the Examiner rejected claims 14 and 18 under 35 U.S.C. §103(a) as allegedly obvious over Record (U.S. Patent No. 5,372,824). The Examiner alleged that Record discloses the combination of flavor and N-ethyl-p-menthane-3-carboxamide ("WS-3") in the claimed amounts. According to the Examiner, it would have been obvious to "use any flavor in that of Record, because the choice of flavor is seen to be no more than a matter of choice." Further, the Examiner stated that there has been no statement of criticality to the claimed flavor, and further that "enhancement [of fruit flavor] would be obvious to that of Record as the same components are used."

The Applicant respectfully traverses the instant rejection, noting that Record specifically involves the formation of a chewing gum including a reduced menthol mint flavor. In fact, the inclusion of a reduced menthol mint flavor is the very basis of Record's disclosure. Record discloses and describes in detail a "mint flavored chewing gum having reduced bitterness." (Col. 1, lines 63-64). Record goes on to state that the reduced bitterness chewing gums include "a mint flavor agent from which at least a portion of l-menthol has been removed." (Col. 2, lines 2-3). Record discloses that chewing gums can be made including flavoring agents, but in each and every instance, the chewing gum includes the reduced menthol mint flavor. In fact, the particular section of Record referred to by the Examiner states

that “a variety of flavoring agents can be used in combination with the mint flavor of the present invention.” (Col. 6, lines 20-21) (emphasis added). Thus, other flavors may be included in Record’s chewing gum, but the chewing gum must include the reduced menthol mint flavor.

In contrast to that of Record, the present claims are directed to a chewing gum including WS-3 and a fruit flavoring. The claims of the present application do not include reduced menthol mint flavoring, and in fact, the inclusion of fruit flavoring with Record’s reduced menthol mint flavoring would not serve to enhance the fruit attributes in the gum. In fact, the inclusion of Record’s reduced menthol mint flavoring along with the fruit flavoring would result in an extremely unpleasant and commercially unsuccessful chewing gum. To demonstrate the inappropriateness of chewing gums including Record’s reduced menthol mint flavoring in combination with fruit flavoring, the Applicant has conducted experimental testing of several chewing gums. The attached Declaration of Maura Titone sets forth the testing and results of such analysis.

As an initial matter, it should be noted that any chewing gum made in accordance with Record would have to include Record’s reduced menthol mint flavoring. It would be improper to remove the reduced menthol mint flavoring from the chewing gums of Record. Under *KSR*, and as explicitly stated in MPEP §2143(A), “the rationale to support a conclusion that the claim would have been obvious is that all the claimed elements were known in the prior art and one skilled in the art could have combined the elements as claimed by known methods with no change in their respective functions.” (emphasis added). Further, MPEP §2143.01 states that “if the proposed modification or combination of the prior art would change the principle of operation of the prior art invention being modified, then the teachings of the references are not sufficient to render the claims *prima facie* obvious.”

In Phase I of the Applicant’s testing, two Samples of chewing gums made in accordance with the teaching of Record were provided to a panel of flavorists. These chewing gums were

designed to include the reduced menthol mint flavor disclosed in Record in combination with the inventive fruit flavor. Samples 1 and 2 therefore included Record's reduced menthol mint flavor and WS-3 in addition to two representative sample fruit flavors – citrus and berry. The results show unequivocally that such chewing gums would be highly unacceptable and would not be consumer friendly. Further, the results show that Samples 1 and 2 did not provide an enhanced fruit flavor, as presently claimed. The panel data showed a high level of "off-notes" for both of these samples. Qualitatively, Sample 1 (including citrus, reduced-menthol, and WS-3) was described as providing a "dark, licorice and brown spice impression" which "became increasingly bitter and had an offnote, which was described as 'soapy, chemical, medicinal, plastic/Band-Aid, turpentine and metallic.'" (Declaration, ¶18). Sample 2 (including berry, reduced-menthol, and WS-3) was described as providing a "chemical-y" offnote. (Declaration, ¶19).

According to the panel analysis, it was determined that chewing gum according to Record and including the claimed fruit flavoring was unacceptable from a consumer standpoint, and would not provide a beneficial perception to the consumer. (Declaration, ¶20). Even further, it can be seen that the chewing gums according to Record and including the claimed fruit flavoring did not provide an enhanced fruit flavor. Thus, including a fruit flavoring in Record's chewing gum does not result in the claims of the present invention.

Record discloses a composition including a reduced menthol mint flavoring. As discussed above, it would be improper to rely upon Record without including a reduced menthol mint flavoring. Based upon the data acquired from the panel study, the combination of Record's reduced menthol mint flavoring with the claimed fruit flavoring does not result in an enhanced flavoring composition. Even further, providing such a chewing gum would be detrimental to the chewing gum, as it provides a foul tasting and non-consumer friendly product. As such, it is respectfully submitted that claims 14, 18, and 21-22 are not obvious over Record. Withdrawal of this rejection is respectfully requested.

In the Office Action, the Examiner asserted that the Applicant did not set forth any criticality of the claimed fruit flavoring in combination with WS-3. In response thereto, the Applicant has conducted an analysis of chewing gums including fruit flavor and WS-3, demonstrating the heightened flavor composition provided by such chewing gums. The Declaration of Maura Titone sets forth the particulars of this study and the results.

In Phase II of the Applicant's study, a side-by-side analysis was conducted for (1) chewing gums including citrus flavor with and without WS-3 and (2) chewing gums including berry flavor with and without WS-3. The panelists were asked to evaluate the chewing gum Samples for several sensory attributes at various time periods in the chewing stage. In addition to qualitative summaries of the chewing gum Samples, the panelists were asked to quantify the sensory attributes of the chewing gum Samples on a 15-point scale.

As presently claimed, the enhanced flavoring composition includes (1) a fruit flavoring agent present in an amount of from about 97.8 to about 99.96% of the enhanced flavoring composition and (2) an amount of WS-3 in an amount of from about 0.04 to about 2.2% by weight of the enhanced flavoring composition. The enhanced flavoring composition is present in a total amount of from about 0.8 to about 3.5% by weight of the chewing gum. To closely track the language of the claims, the chewing gum tested in Phase II of the Applicant's study included WS-3 at 1.2% by weight of the flavoring agent, flavoring agent in a total amount of 1.29% by weight of the chewing gum.

As set forth in the Declaration of Maura Titone, the chewing gums including representative citrus and berry flavors in combination with WS-3, as presently claimed, provided a heightened sensory perception in various attributes related to fruit flavor intensity. The inventive compositions therefore provided an enhanced flavor to the chewing gum. The Declaration states that:

The comparative tests conducted show that chewing gum incorporating WS-3 in combination with a citrus flavoring composition provides a statistically significantly higher level of attributes including sourness, mouth sensation, and

chemical cooling. Taken together, these attributes result in a citrus flavored chewing gum with enhanced taste perception. (Declaration, ¶50).

Further, the Declaration states that:

Similarly, the comparative tests conducted show that chewing gum incorporating WS-3 in combination with a berry flavoring composition provides a statistically significantly higher level of attributes including sourness, mouth sensation, sweetness and chemical cooling. Taken together, these attributes result in a berry flavored chewing gum with enhanced taste perception. (Declaration, ¶51).

Based upon the testing conducted by the Applicant, it has been demonstrated that the inclusion of fruit flavoring in combination with WS-3 in the amounts presently claimed provides a significantly enhanced flavoring composition. The fact that WS-3 in the claimed amount provides such an enhanced fruit flavoring composition was an unexpected and surprising result which would not be considered obvious to one of skill in the art. (Declaration, ¶53). As such, the Applicant asserts that a sufficient showing of criticality of fruit flavoring in combination with the claimed amount of WS-3 has been set forth herein, and respectfully requests that the rejection over Record be withdrawn.

Favorable action is earnestly solicited. If there are any questions or if additional information is requested, the Examiner is respectfully requested to contact Applicant's attorney at the number listed below.

Respectfully submitted,



Jon A. Chiodo  
Registration No. 52,739  
Attorney for Applicant

HOFFMANN & BARON, LLP  
6900 Jericho Turnpike  
Syosset, New York 11791  
(973) 331-1700